Rubenstein orally agreed to remove asbestos that had been used as pipe insulation. Subsequently, Ekstein observed workers removing asbestos wrapping without wetting it or otherwise complying with the applicable work standard practices.

Ekstein observed that Marvin was "right around that area" where the workers were removing the insulation, "standing right near the asbestos." When he said, "Marvin, you can't do it this way," Marvin replied that Ekstein should not worry about it, because "this is blown out of proportion, it is not that big a deal." Although his own possible exposure to asbestos had made Ekstein "nervous for my own health" and prompted him to go home and change his clothes, he acknowledged that Marvin, Isaac, and 83-year-old Bella Rubenstein (Marvin's mother and Isaac's grandmother) were all in the building at that time, and that, although they were exposed to asbestos flakes, they were not wearing any protective clothing.

Similarly, Hector Santos, the foreman of a group of men who worked on the demolition for a period of four days, testified that he saw Marvin assisting two workers who were placing boxes containing the removed materials into trucks that compressed the boxes and caused dust to rise. According to Santos, even when Marvin was standing "right there in the middle"of the area where the asbestos was being taken to a truck, "with all the dust flying" and "with his face near the boxes," Marvin himself did not wear a mask. Santos also saw Marvin's mother in the building during the time the demolition was being performed.

As part of the defense case, Bella Rubenstein testified that in her son's home, as in her own, there were no televisions and no English-language newspapers.

II. The Court's Instructions to the Jury

Based on an earlier Second Circuit opinion, *United States v. Weintraub*, 273 F.3d 139 (2d Cir. 2001), the district court instructed the jury, over objection, that the petitioners could be convicted if (1) they were owners or operators of renovation activity; (2) they knew the renovation involved asbestos; and (3) they knew that the asbestos was not being wetted, carefully lowered to the floor without being damaged or disturbed, or kept wet while awaiting collection, or that no representative trained in the NESHAPS was present. The court further explained that:

> Under the third element requiring the government to prove beyond a reasonable doubt that at least one of those four work practice standards had not been complied with, the government need not prove that the defendant knew what these work practice standards were. It is sufficient if the government proves beyond a reasonable doubt that the defendant had knowledge of the facts and attendant circumstances that constituted a violation of the work practice standards and not that the defendant specifically knew that his conduct was illegal.

In so charging, the court rejected a defense request for an instruction requiring that the jury find at least a general

awareness that the petitioners were engaging in unlawful conduct, and its contention that a finding of guilt would be improper if the jury concluded that the defendants were actually unaware that there were compulsory regulations governing asbestos removal, and thus that presumptions concerning what a "reasonable person" can be expected to know had been rebutted. Specifically, the defense had requested that the district court instruct the jury that:

> The government must also prove beyond a reasonable doubt that the defendants are "reasonable" such that they would also have known that asbestos is regulated and that some form of liability flows from violating regulations such as work-practice standards.

During the charge conference, defense counsel supplemented that request by asking the court to explain that "while a specific violation of the Clean Air Act or any of these regulations was not required, that there has to be some general sense that they were doing something that was illegal."

III. The Decision of the Court of Appeals

On appeal from their convictions and sentences[1], the Rubensteins contended that the district court's charge improperly permitted conviction based on a level of *mens rea* that was insufficient to establish criminal culpability. The Second Circuit's earlier opinion in *Weintraub* had recognized that criminal statutes must be interpreted to require sufficient *scienter* to distinguish conduct that is culpable from conduct that is innocent, and had relied on cases holding that "knowledge may suffice for criminal culpability if 'extensive enough to attribute to the knower a "guilty mind"or knowledge that he or she is performing a wrongful act.'" *Weintraub*, 273 F.3d at 147, quoting *United States v. Sanders*, 211 F.3d 711, 723 (2d Cir.), *cert. denied*, 531 U.S. 1015 (2000), and *United States v. Figueroa*, 165 F.3d 111, 115-16 (2d Cir. 1998). Noting the proliferation of local, state, and federal regulations

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[1]The petitioners were convicted of both the substantive and conspiracy counts of the indictment. Departing from the Guidelines based on a combination of factors, including aberrant behavior and lifetimes of good works, the district court sentenced Marvin to an 18-month term of imprisonment, to be followed by a three-year term of supervised release, and a $75,000 fine, and Isaac to imprisonment for a term of twelve months and one day, to be followed by a three-year term of supervised release, and a fine of $7,500. The court also issued to both defendants, jointly and severally, an order of restitution in the amount of $30,000. The restitution ordered by the district court was paid on January 28, 2004. Even though the sentencing order provided that the fines were not payable until six months after the conclusion of incarceration, both appellants' fines were paid in full on March 2, 2004.

concerning asbestos, as well as the multitude of high-profile lawsuits regarding asbestos-related ailments, the Court of Appeals concluded that culpable knowledge could be inferred from awareness of the presence of asbestos because "no *reasonable* person – let alone a sophisticated real estate developer like Weintraub – could be unaware that asbestos in almost all of its applications is closely regulated." 273 F.3d at 149-50 (emphasis added).

The Rubensteins argued that here, in contrast to *Weintraub*, at least one view of the evidence could have led the jury to the conclusion that the defendants did not have the "awareness" that a "reasonable" person can be presumed to have about asbestos – or at least that such an awareness was not proven beyond a reasonable doubt. In support of this argument, they pointed to evidence that the Rubensteins were largely insulated from modern culture and that a failure to appreciate the dangerous, and therefore regulated, nature of asbestos was demonstrated by evidence that the petitioners and other members of their family exposed themselves to direct contact with unwetted asbestos without wearing masks or protective clothing, and that Marvin had been "right there in the middle" with "all the dust flying" while the asbestos was being removed.

Rejecting this argument, the Second Circuit re-affirmed *Weintraub*'s holding that the phrase "knowingly violates" in 42 U.S.C. § 7413 "bespeaks 'knowledge of facts and attendant circumstances that comprise a violation of the statute, not specific knowledge that one's conduct is illegal.'" *United States v. Rubenstein*, 403 F.3d 93, 97 (2d Cir. 2005), quoting *Weintraub*, 273 F.3d at 147. The Court concluded that:

> The defendants may be immersed in a culture that does not concern itself with the environmental hazards of asbestos, but that does not bear upon the nature of the prohibition. The statute presupposes a knowledge that asbestos is a regulated material, the way other criminal statutes presuppose basic knowledge of the physical world; and there is no basis for the defendant's contention that this is a rebuttable presumption.

403 F.3d at 98. Based on this determination, the Court of Appeals affirmed the convictions.[2]

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[2]The Court concluded, however, that the district court had erred in calculating petitioners' offense levels under the United States Sentencing Guidelines, and it remanded for resentencing consistent with that determination, as well as with this Court's intervening opinion in *United States v. Booker*, __ U.S. __, 125 S.Ct 738 (2005). Petitioners were released after serving approximately 9 weeks of their sentences pursuant to an order of the Second Circuit granting bail pending appeal, and they remain at liberty pending their resentencing, which is scheduled for September 7, 2005.

REASONS FOR GRANTING THE WRIT

Granting a writ of certiorari will permit this Court to resolve a conflict between the decison below and relevant decisions of this Court; additionally, in the context of environmental offenses in which the government has broad discretion to pursue either civil or criminal sanctions, it will enable this Court to resolve whether, consistent with fundamental principles of criminal culpability, a jury should be permitted to reject a presumption regarding guilty knowledge and to acquit a defendant whose non-compliance with environmental regulations is not accompanied by *mens rea*

The conduct at issue in the present case – removal of insulating material from old pipes during a building renovation performed by individuals who are not in the business of engaging in such work – is, by its nature, commonplace and innocuous. Indeed, unless the insulation material not only contains asbestos, but meets the technical specifications of "regulated asbestos containing material" ("RACM") as defined in the Code of Federal Regulations, and unless it comprises at least 260 linear feet, no federal regulation governs the manner of its removal. *See* 40 C.F.R. § 61.141. It is only the fact that the insulation material in the present case consisted of the requisite quantity of RACM that permitted the petitioners' conduct to be transformed from innocent acts into felonies punishable by up to five years' imprisonment.

The court below concluded that criminal sanctions were properly imposed on the petitioners, even if the jury

could not find wrongful intent, based on the presumption that any "reasonable person" understands that asbestos is inherently dangerous and that its handling must therefore be subject to governmental regulations. *See Rubenstein*, 403 F.3d at 98. By requiring the jury to convict the Rubensteins even if the evidence – particularly the uncontroverted testimony that petitioners personally exposed themselves and other family members to contamination by unprotected contact with free-flowing asbestos – raised a reasonable doubt as to whether they in fact understood the dangerous character of the asbestos they were removing, the jury instructions in the present case flew in the face of a fundamental principle that this Court has long upheld: the principle that criminal sanctions require a culpable *scienter*.[3] Certiorari is warranted so that this Court can resolve a conflict between the present opinion and relevant decisions of this Court, and so that it may

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[3]The Second Circuit's opinion completely overlooked the uncontroverted evidence that the Rubensteins exposed themselves to asbestos without wearing masks or gloves. Instead, it presented a skewed version of the evidence "'in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor.'". *Rubenstein*, 403 F.3d at 96, quoting *United States v. Monaco*, 194 F.3d 381, 383-84 (2d Cir. 1999). In doing so, the Court of Appeals ignored its own precedents establishing that where, as here, the issue is whether a jury charge reflecting a theory of defense should have been given, the question is not whether the evidence, viewed most favorably to the government, convinces the Court of the defendant's position. Rather, it is whether the theory underlying the defendant's request is supported by "any foundation in evidence, no matter how weak or incredible that evidence may be." *United States v. LaMorte*, 950 F.2d 80, 84 (2d Cir.1991). Thus, the Court of Appeals' rejection of petitioners' argument arose, at least in part, from application of the wrong standard of review.

consider whether instructions that prevented the jury from considering the absence of such *scienter* unfairly diluted the requirement of *mens rea* and were therefore inconsistent with the constitutional right to due process.

As this Court explained more than a half-century ago:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to;" and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Morissette v. United States, 342 U.S. 246, 250-51 (1952).

Morissette was the first in a line of cases in which this Court "interpret[ed] criminal statutes to include broadly applicable *scienter* requirements, even where the statute by its terms does not contain them." *United States v. X-Citement*

Video, Inc., 513 U.S. 64, 70(1994). *See also Staples v. United States*, 511 U.S. 600, 614 (1994) (construing a firearms statute's *mens rea* requirement in a manner that avoids the possibility of imposing criminal sanctions on individuals whose "mental state . . . makes their actions entirely innocent"). Earlier this year, this Court re-affirmed that principle by holding, in *Arthur Andersen LLP v. United States*, __ U.S. __, 125 S.Ct 2129 (2005), that a statute prohibiting obstruction of justice [18 U.S.C. § 1512] must be interpreted in a manner that allows it to reach "only those with the level of 'culpability . . . we usually require in order to impose criminal liability.'" 125 S.Ct at 2136, quoting *United States v. Aguilar*, 515 U.S.593, 602 (1995), and citing *Liparota v. United States*, 471 U.S. 419, 426 (1985). *See also Hanousek v. United States*, 528 U.S. 1102, (2000) (Thomas and O'Connor, JJ., dissenting from denial of certiorari) ("we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations").

The seminal case undergirding the notion that criminal sanctions may be imposed for violating environmental regulations even against a defendant who is unaware of those regulations is *United States v. International Minerals and Chemicals, Corp.*, 402 U.S. 558 (1971). In that case, this Court held that shipment of sulfuric acid in violation of Interstate Commerce Commission regulations could give rise to criminal penalties even though the defendant had no knowledge of those regulations. The Court recognized that, like sulfuric acid:

> Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process

> questions if Congress did not require, as in [*United States v.*] *Murdock*, [290 U.S. 389(1933)] "mens rea" as to each ingredient of the offense. But where, as here and as in [*United States* v.] *Balint* [258 U.S. 250(1922)] [involving narcotics] and [*United States v.*] *Freed* [401 U.S. 601(1971)] [involving hand grenades], dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.

402 U.S. at 564-65.

The continued validity of the rationale articulated in *International Minerals and Chemicals* has been thrown into question by this Court's decision in *Staples*. In that case, which involved prosecution for possession of a "machine gun" in violation of 26 U.S.C. § 5845, this Court held that the fact that firearms are "dangerous" does not, in and of itself, relieve the government of the burden of proving that the defendant was aware of the particular characteristics of the firearm he possessed that brought it within the statutory prohibition. 511 U.S. at 610-11, 619. Recognizing the "long tradition of widespread lawful gun ownership by private individuals in this country," and that, despite their dangerousness, "guns generally can be owned in perfect innocence," 511 U.S. at 610-11, this Court held that, before the defendant could be branded a criminal, the government must show particularized knowledge of the circumstances that made the defendant's firearm sufficiently dangerous to warrant regulation.

No less than owning firearms or discarding documents (or counseling others to withhold documents), *see Arthur Andersen*, 125 S.Ct at 2134-35, removing asbestos may, under appropriate circumstances, be performed in "perfect innocence." Nonetheless, in the present case, the Court of Appeals would not permit the jury to consider evidence that the petitioners, like the defendant in *Staples*, did not understand that the material they were handling bore the characteristics that would subject it to strict regulation. While this Court, in *Staples*, refused to indulge a presumption that the defendant must have been aware that the firearm he possessed was likely to require registration, and that his failure to ascertain the applicable regulations exposed him to criminal prosecution and conviction, the Court of Appeals in the present case held that the Clean Air Act "presupposes a knowledge that asbestos is a regulated material," *Rubenstein*, 403 F.3d at 98, and that a defendant's lack of such knowledge may not be relied on by a jury as a basis for acquittal.

A grant of certiorari would give this Court an opportunity to resolve the conflict between the present case and *Staples*, and to reconcile the law applicable to criminal prosecution under the Clean Air Act with the principles of criminal culpability that this Court has consistently championed. Doing so would also permit this Court to clarify the reach of the criminal law in an area in which, at present, "EPA retains substantial discretion to choose among administrative, civil judicial, and criminal remedies." Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 Harv. Envtl. L. Rev. 105, 116 (2003). Reviewing a case in which the lower courts permitted the petitioners to be convicted of serious crimes without allowing a jury to consider evidence demonstrating that they failed to comprehend the danger that brought their conduct

within the purview of the criminal law will enable this Court to provide meaningful and consistent guidance concerning the essential need to ensure that criminal sanctions are not extended to individuals whose "mental state . . . makes their actions entirely innocent" *Staples*, 511 U.S. at 614 .

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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July 2005

No.

In The

Supreme Court of the United States

October Term, 2005

MARVIN RUBENSTEIN and ISAAC RUBENSTEIN,

Petitioners,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari From the United States Court of Appeals for the Second Circuit

APPENDIX

SW

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Appendix A – Decision of The United States Court of Appeals for the Second Circuit, Decided March 31, 2005 [Pages 1a – 16a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: December 6, 2004 Decided: March 31, 2005)

Docket No. 03-1721

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARVIN RUBENSTEIN, aka Jacob Rubenstein,
ISAAC RUBENSTEIN,

Defendants-Appellants.

Before:

CARDAMONE, JACOBS, and CABRANES,
Circuit Judges.

Marvin Rubenstein and Isaac Rubenstein appeal from judgments of the United States District Court for the Eastern District of New York (Block, *J.*) convicting them after a jury trial of violating the work-practice standards for asbestos set out in the Clean Air Act, and of conspiracy to do so. On appeal, defendants challenge their convictions on the ground that the jury charge allowed conviction without a finding of wrongful intent, and challenge their

sentences with respect to certain enhancements, of which we consider the enhancement pursuant to Sentencing Guideline Section 2Q1.2(b)(4) for failure to obtain a New York State permit. We affirm the convictions and remand to the district court with instructions to vacate the sentences and to conduct resentencing consistent with this opinion and *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), and not inconsistent with *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

Judge Cardamone concurs in the majority opinion and in a separate concurring opinion.

JEREMY GUTMAN (Lawrence Herzog, on the brief), New York, NY *for defendants-appellants*.

ANDREW J. FRISCH, Assistant United States Attorney for the Eastern District of New York, Brooklyn, NY (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, David C. James, Assistant United States Attorney for the Eastern District of New York, *on the brief*) *for appellee*.

DENNIS JACOBS, *Circuit Judge*:

Marvin Rubenstein and Isaac Rubenstein (collectively "defendants") appeal from judgments of the United States District Court for the Eastern District of New York (Block, *J.*), convicting them after a jury trial of violating the work-practice standards for asbestos set out in the Clean Air Act,

see 42 U.S.C. § 7412 *et seq.*, 40 C.F.R. §§ 61.145, 61.150, and of conspiracy to do so. Defendants challenge their convictions on the ground that the district court's instruction that the jury could find that defendants knowingly violated the Clean Air Act if they found that defendants knew that the renovation involved asbestos erroneously failed to require any finding of "wrongful intent." Defendants contend that they live in an insular religious community of Hasidic Jews in which the dangers of asbestos are not a matter of common knowledge or interest. The defendants also challenge the imposition of certain sentencing enhancements, including whether the sentences were properly enhanced pursuant to Sentencing Guideline Section 2Q1.2(b)(4) for failure to obtain a New York State permit notwithstanding that the Clean Air Act itself contains no such permit requirement. For reasons that follow, we affirm the convictions, and remand to the district court with instructions to vacate the sentences and to conduct resentencing consistent with this opinion and *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), and not inconsistent with *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

I

" 'Because defendants appeal their convictions after a jury trial, our statement of the facts views the evidence in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor.' " *United States v. Monaco*, 194 F.3d 381, 383-384 (2d Cir. 1999) (quoting *United States v. Salameh*, 152 F.3d 88, 107 n.1 (2d Cir. 1998) (*per curiam*)).

For over 30 years, the Rubenstein family owned a commercial building at 2 Prince Street in Brooklyn, New

York. As of 2000, the building was owned by Philrub Realty Corporation, of which Marvin Rubenstein was president. Among the building's commercial tenants was a sweater factory owned by the Rubenstein family, Atlas Knitting, Inc., which was run by Marvin Rubenstein and his mother, Bella Rubenstein. Marvin's son, Isaac Rubenstein, assisted his father in running Atlas Knitting and in managing 2 Prince Street.

In April 2000, a real estate developer, Erik Ekstein, expressed interest in acquiring 2 Prince Street. After observing what he believed was asbestos on exposed pipes at the property, Ekstein hired an environmental consultant who inspected the property on May 1, 2000, and removed samples from pipes. Isaac accompanied the consultant on the inspection. At one point, Isaac offered to help in removing one of the samples, but the consultant declined, advising Isaac that the material contained asbestos. Ekstein's consultant testified that she used the word "asbestos" approximately ten times during her conversations with Isaac that day.

In July 2000, Marvin and Ekstein executed a 49-year, $50 million lease. Marvin orally agreed to remove the asbestos as a condition of the lease.

In December 2000, Marvin hired men who he had previously employed at Atlas Knitting to remove all pipe insulation at 2 Prince Street, including Jose Jimenez, his brother Juan, and Carlos Perez. Marvin did not tell them that the material was asbestos. Marvin directed the men to remove the material with a knife or scissors and to put it in boxes. Although Marvin and Bella Rubenstein were present during this work, neither wore protective clothing.

From December 4 through 7, 2000, Ekstein's contractors performed demolition work at 2 Prince Street. The supervising contractor discovered dry asbestos in boxes (the top flaps of which were "criss-crossed" rather than sealed), and observed Marvin ordering his workers in Spanish to place the boxes in a garbage compacting truck. On December 5, Ekstein's contractor informed Marvin's workers that they were removing asbestos and provided them with dust masks.

On February 8, 2001, Ekstein told Marvin that the asbestos could not be removed in the manner in which Marvin directed. Marvin replied: "[D]on't worry about it, this is blown out of proportion, it is not that big a deal."

Throughout that day, officials from the New York City Department of Environmental Protection ("DEP") visited the premises. Marvin told them that he and Isaac had hired men off the street to remove the insulation without knowing that it contained asbestos, that removal began earlier that week, and that the insulation was boxed and taken to a warehouse. Isaac told the officials that the men were hired off the street to remove asbestos, that removal work had begun that day, and that no asbestos was transported from the building. Although Isaac used the term "asbestos" in his initial conversation with the first DEP official to arrive at the property, Isaac later denied knowing the nature of the insulation material. Photographs taken that day showed exposed asbestos hanging from pipes and in open boxes.

DEP's director of asbestos enforcement advised Marvin and Isaac that the building was contaminated, that they needed to hire a contractor to remove the asbestos, and that no contractor could begin work without DEP approval. Federal authorities were notified.

On Friday, February 9, 2001, the DEP Commissioner issued an order directing defendants to vacate the building, to submit by the next day a "scope of work" order for DEP approval, and to remediate the asbestos contamination.

Also on February 9, 2001, FBI agents visited 2 Prince Street and interviewed Marvin and Isaac separately. Both Marvin and Isaac told the agents that they hired workers off the street to perform asbestos removal and that they directed the workers to box the removed material.

Despite the DEP's explicit instructions, an asbestos contractor toured the property on February 11, 2001, and, at Isaac's request, agreed to remove the asbestos that same day for a $10,000 cash payment. Isaac informed the contractor that he need not submit a "scope of work" order to the DEP and that he should lock the door if the DEP came around. While the contractor was preparing to remove the asbestos, the DEP's director of asbestos arrived at the scene and discovered that preparations were underway to remove the asbestos. The next day, a different asbestos contractor submitted and obtained DEP approval for a "scope of work" order and subsequently performed the asbestos abatement to the satisfaction of DEP.

On June 27, 2001, Isaac (accompanied by counsel) met with two federal agents and an Assistant United States Attorney, and gave four varying accounts of the asbestos removal. Isaac said that he had never heard the word "asbestos" until his February 8, 2001 meeting with DEP officials.

At trial, before summations, Judge Block rejected defendants' request that he charge that jury that:

> The government must also prove beyond a reasonable doubt that the defendants are "reasonable"

such that they would also have known that asbestos is regulated and that some form of liability flows from violating regulations such as work-practice standards.

Instead, Judge Block instructed the jury, pursuant to *United States v. Weintraub*, 273 F.3d 139, 147 (2d Cir. 2001), that the government must prove only that defendants knew that the substance removed was asbestos and were aware of the manner in which it was removed.

II

On appeal, defendants argue that Judge Block's jury instruction erroneously permitted the jury to convict without finding that defendants were aware of asbestos regulation. We review the district court's jury instruction *de novo*, but will reverse only if the charge as a whole caused prejudice. *See United States v. Bok*, 156 F.3d 157, 160 (2d Cir. 1998); *United States v. Locascio*, 6 F.3d 924, 939 (2d Cir. 1993).

A person is criminally liable under the Clean Air Act if he "*knowingly violates* any requirement or prohibition of . . . section 7412 of this title." 42 U.S.C. § 7413(c)(1) (emphasis added). The phrase "knowingly violates" bespeaks "knowledge of facts and attendant circumstances that comprise a violation of the statute, not specific knowledge that one's conduct is illegal." *Weintraub*, 273 F.3d at 147; *see also United States v. Buckley*, 934 F.2d 84, 88 (6th Cir. 1991) (holding, in a case involving the Clean Air Act asbestos work-practice standards, that "knowingly violate[s]" does not require knowledge of the illegality of one's conduct). Under this standard, because "no one can reasonably claim surprise that asbestos is regulated and

that some form of liability is possible for violating those regulations," *Weintraub*, 273 F.3d at 151, to sustain a conviction for violation of asbestos work-practice standards, the government need only prove that a defendant knew that the material being removed was asbestos.

Defendants seize upon the adverb "reasonably," and claim that they are not the "reasonable" people contemplated in *Weintraub* because they belong to an insular religious community of Hasidic Jews in which asbestos is not a subject of interest, and because they are not influenced or educated by outside media by virtue of their insulated lives. They contend therefore that it was never proved that they appreciated the dangers of the material.

We are unconvinced. The defendants may be immersed in a culture that does not concern itself with the environmental hazards of asbestos, but that does not bear upon the nature of the prohibition. The statute presupposes a knowledge that asbestos is a regulated material, the way other criminal statutes presuppose basic knowledge of the physical world; and there is no basis for the defendant's contention that this is a rebuttable presumption.

In any event, even if a good faith defense had been available, the defendants would not have been entitled to it. The defendants are sufficiently worldly to own the asbestos-contaminated real estate and to negotiate for its removal as a condition of a $50 million lease. They were also notified that asbestos was a regulated substance prior to their attempts to remove it from their building. Even after the defendants were directly confronted by authorities, they did not conform their behavior to the regulatory requirements. Instead, they lied about their criminal activities and attempted to circumvent the law. Their claim that they acted in good faith and were

ignorant of the attendant dangers of their conduct is therefore without foundation. *See United States v. Workman*, 80 F.3d 688, 702 (2d Cir. 1996) (concluding that the District Court did not err in refusing to instruct the jury on a defense for which there was no evidentiary foundation). Accordingly, the district court properly rejected defendants' suggested charge and instructed the jury pursuant to *Weintraub*.

III

Defendants challenge three sentencing enhancements and allege that various aspects of their sentences violate *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), "a ruling that *Booker* has now explicitly applied to the Guidelines." *United States v. Williams*, ___ F.3d ___, 2005 U.S. App. LEXIS 3198, at *6 (2d Cir. Feb. 23, 2005).

Ordinarily, post-*Booker*, we would remand for the district court to consider whether the original sentence—imposed pre-*Booker* on the then-valid mandate of the Guidelines—would have been different if the district judge had appreciated his discretion to frame the sentence based on the fact that the Guidelines are advisory. *See Crosby*, 397 F.3d at 117-18. Here, however, we conclude that the sentencing enhancements—one of which was made in error—may have an appreciable influence even under the discretionary sentencing regime that will govern the resentencing, and under which the Guidelines sentence will be a benchmark or a point of reference or departure. *See id.* Our decision of these Guidelines issues obviates any future challenge to the reasonableness of a discretionary sentence on the ground that it was made under the influence of these

enhancement rulings.[1] This Guidelines analysis does not, however, foreclose future reasonableness review of defendants' sentence on other grounds (including those enumerated in 18 U.S.C. § 3553), and we express no opinion as to whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable. And because the Guidelines error non-trivially affected the Guidelines sentence imposed as a mandate, vacatur of the sentence is necessary without reference to *Blakely* or *Booker* or the principles of resentencing set out in *Crosby*.

This Court reviews the district court's interpretation of the Sentencing Guidelines *de novo*, *see United States v. Adler*, 52 F.3d 20, 21 (2d Cir. 1995) (*per curiam*), reviews the district court's findings of fact for clear error, *see* 18 U.S.C. § 3742(e); *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994); *United States v. Cousineau*, 929 F.2d 64, 67 (2d Cir. 1991), and gives due deference to the district court's application of the Guidelines to the facts, *see* 18 U.S.C. § 3742(e).

First, defendants challenge the sentence enhancement made under Sentencing Guideline Section 3B1.1, on the ground that the evidence was insufficient to establish that either defendant acted as a leader or supervisor, or that the criminal activity was "otherwise extensive." Three factors determine whether an activity is "otherwise extensive": "(i) the number of knowing participants; (ii) the number of

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[1] Although we review the district court's Guidelines determination in this case, we do not suggest that every panel of this Court confronted with post-*Booker* sentencing issues must first decide the district court's Guidelines determination prior to remanding for resentencing consistent with *Booker* and *Crosby*. *See United States v. Hughes*, 396 F.3d 374, 381 n.9 (4th Cir. 2005). We likewise do not suggest that cases such as this (where there is a Guidelines error) present the only circumstances in which pre-remand Guidelines analysis is warranted.

unknowing participants whose activities were organized or led by the defendant with specific criminal intent; [and] (iii) the extent to which the services of the unknowing participants were peculiar and necessary to the criminal scheme." *United States v. Carrozzella*, 105 F.3d 796, 803-04 (2d Cir. 1997) *abrogated in part on other grounds, United States v. Kennedy*, 233 F.3d 157, 160-61 (2d Cir. 2000). Here, as the district court found, there were at least two knowing participants—Marvin and Isaac—and as many as seven participants who were unknowing, including the three named workers and another four day laborers (including two men Isaac admitted hiring "off the street"). The labor of these persons was clearly necessary to the violation. Under the direction of Marvin (as president of the corporate entity that owned 2 Prince Street), the men worked without protective clothing to: cut asbestos off the pipes, place it in unsealed containers and load the boxes into a compactor truck.

These facts support the district court's determination that Marvin was the leader of the criminal activity. As to Isaac, there is sufficient evidence to support the finding that Isaac exercised a "supervisory role": the building's new tenant testified that Isaac acted as Marvin's "right-hand man"; Isaac accompanied a private environmental consultant through the property; and Isaac spoke with DEP officials to account for the asbestos removal. Sentencing Guideline Section 3B1.1 was applicable to both defendants.

Second, defendants object to the six-level enhancement pursuant to Sentencing Guideline Section 2Q1.2(b)(1)(A) for "ongoing, continuous, or repetitive" discharge of asbestos. We agree with the district court that the illegal asbestos removal at 2 Prince Street was repetitive. It

occurred during two separate one-week periods—first in December 2000, and again in February 2001—on multiple floors of the building. There was sufficient evidence of this conduct to support the six-level enhancement.

Finally, defendants challenge the four-level enhancement for permitless transportation of a hazardous or toxic substance pursuant to Sentencing Guideline Section 2Q1.2(b)(4). Section 2Q1.2 applies if "the offense involved transportation, treatment, storage, or disposal" of a hazardous or toxic substance "without a permit or in violation of a permit." U.S.S.G. § 2Q1.2(b)(4). In imposing this enhancement, the district court cited defendants' violation of two state regulations requiring a transporter of asbestos to have a permit and to inform landfill operators of his intent to dispose of asbestos: 6 N.Y.C.R.R. §§ 360-1.7(a)(1) ("[N]o person shall . . . construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to this Part. . . ."); and 360-2.17(p)(1) ("The transporter, having a permit pursuant to Part 364 of this Title must first inform the landfill operator of his intent to dispose of asbestos waste, the volume of the waste, and the anticipated date the shipment will arrive at the landfill.").

Defendants argue that the New York permitting requirements are inapplicable because there is no evidence that the defendants were involved in the construction or operation of a waste management facility or that they transported asbestos to a landfill. As the government indicates, this argument was not raised in the district court, so the government had no opportunity to enhance the record in this regard. In any event, the enhancement is inapplicable because the Clean Air Act offense committed by the defendants did not "involve" the violation of

the New York State permit regulations. U.S.S.G. § 2Q1.2(b)(4).

This is a matter of first impression in this Circuit, but the Third Circuit decided the same issue in *United States v. Chau*, 293 F.3d 96 (3d Cir. 2002). Chau, like the Rubensteins, was charged with violating the Clean Air Act. The Third Circuit ruled that Section 2Q1.2(b)(4)'s four-level enhancement is inapplicable unless the offense charged "involve[d]" a permit violation; consulted the dictionary definition of "involve" (" 'to relate to closely: [to] connect' and 'to have within or as part of itself: [to] include,' "); concluded that the city permit involved in Chau's offense was not "integral" to his Clean Air Act violation; and held that "[b]ecause the Clean Air Act does not contemplate a permit violation as a basis of enforcement, the Section 2Q1.2(b)(4) enhancement is not available." *Id.* at 102 (citations omitted).

The government argues that the Third Circuit erroneously adds to Section 2Q1.2(b)(4) a requirement that the permit be part of the federal enforcement regime and thus "ignore[s] the inter-relationship between federal, state and local environmental agencies in New York and elsewhere." We disagree. The wording of Section 2Q1.2 requires that the "offense involve[ ]" activity in violation of a permit. The Clean Air Act—in contrast to several other federal environmental statutes that contain an express federal permit requirement[2] or delegate the permitting function to

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[2] *See, e.g.*, 43 U.S.C. § 1350(c) (imposing criminal liability for violating a permit issued under chapter governing submerged lands near continental shelf); 7 U.S.C. § 136j (making it unlawful to exceed the "experimental use permit" issued by the EPA for a pesticide).

the states[3]—expressly does not require a permit for the disposal of asbestos. *See* 40 C.F.R. § 70.3(b)(4) (exempting asbestos from a permit requirement); *see also* 57 Fed. Reg. 32250, 32263 (1992) ("The burden imposed by requiring permits for asbestos demolition and renovation sources is unnecessary because it would provide few additional environmental or enforcement benefits."). The Rubensteins' offense—violation of the Clean Air Act—therefore did not "involve" a permit violation. The district court erred by considering state permitting requirements—that are arguably inapplicable to defendants—in imposing this enhancement.

Having undertaken review of the guidelines question, which is significant and which can have ramifications in other cases, and having decided that the guidelines application was erroneous, we vacate the sentences because we think that the influence of this error is likely to be so pronounced that it could cause resentencing after remand to be unreasonable.

Conclusion

For the foregoing reasons, we affirm defendants' convictions and remand to the district court with instructions to vacate defendants' sentences, and conduct resentencing consistent with this opinion and *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), and not inconsistent with *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

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[3] *See* 33 U.S.C. § 1319(c)(1) & (2) (prohibiting negligent and knowing violation of any effluent limitation or condition of a pollutant discharge permit issued pursuant to 33 U.S.C. § 1342, which creates a permitting scheme administered by the EPA or the states if approved by the EPA).

CARDAMONE, *Circuit Judge, Concurring*:

I agree with the result and reasoning in this case, with one possible exception stated below. I write separately because I believe it important to highlight the fact that our decision to vacate the sentence in this case should not be taken as precedent automatically to vacate all incorrectly calculated Guidelines sentences in the future.

In the wake of *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738 (2005), we remand sentences imposed under the prior mandatory Guidelines regime to allow the district court to consider whether, in light of its newly minted discretion to impose a non-Guidelines sentence, it wishes to resentence, thus curing the Sixth Amendment violation identified in *Booker*. *See United States v. Crosby*, 397 F.3d 103, 117-18 (2d Cir. 2005). As we state in our opinion, we exercise discretion in these transitional cases to consider the propriety of the district court's original Guidelines calculation before remanding, and, in circumstances such as those here, to vacate an erroneous Guidelines sentence. Of course, since *Booker* requires all sentences from this point forward to be reviewed for "reasonableness," 125 S. Ct. at 765, our decision to vacate an erroneous Guidelines sentence does *not* mean that if the district court, on remand, imposes a correct Guidelines sentence, we would necessarily find that sentence reasonable upon subsequent review. Correct application of the Guidelines is but one factor to be considered under 18 U.S.C. § 3553 in reviewing reasonableness, *see Booker*, 125 S. Ct. at 766 (stating that the factors in 18 U.S.C. § 3553 "will guide appellate courts . . . in determining whether a sentence is unreasonable"), and it is entirely possible that a correctly calculated Guidelines sentence might nonetheless be found unreasonable upon consideration of other factors.

By the same token, an incorrectly calculated Guidelines sentence might nonetheless be reasonable. I thus think it necessary to clarify our statement that "because the Guidelines error non-trivially affected the Guidelines sentence imposed *as a mandate*, vacatur of the sentence is necessary without reference to *Blakely[v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004)] or *Booker* or the principles of re-sentencing set out in *Crosby*." Majority op. *supra* (emphasis added). I do not agree with the majority that vacatur is "necessary" rather than discretionary, and I likewise do not agree that our decision to vacate is unrelated to our obligations under *Booker* and *Crosby*; indeed, we go on (correctly) to state that we vacate "*because* we think [the error is] so pronounced that it could cause a resentencing after remand to be unreasonable." Majority op. *supra* (emphasis added).

In any event, we confine our statement regarding vacatur to pre-*Booker* sentences imposed as a mandate. We will soon be faced with a growing number of post-*Booker* sentences, including those that return to us after a *Crosby* remand. Those sentences will be reviewed for reasonableness, and because an incorrectly calculated Guidelines sentence might nonetheless be reasonable, vacatur of a sentence based on Guidelines errors would not automatically be warranted.

Appendix B – Order of the United States Court of Appeals, Denying Petition for Rehearing, Dated April 26, 2005 [Pages 17a – 18a]

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK, 10007

Roseann B. MacKechnie
CLERK

Date: 4/26/05

Docket Number: 03-1721-cr
Short Title: USA v. Rubenstein
DC Docket Number: 02-cr-415
DC: EDNY (BROOKLYN)
DC Judge: Honorable Frederic Block

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 28th Dated of April two thousand five.

Present:

Hon. RICHARD J. CARDAMONE,

Hon. DENNIS JACOBS,

Hon. JOSE A. CABRANES,

CIRCUIT JUDGES,

USA v. RUBENSTEIN Docket No.: 03-1721

APPENDIX A
[Decision of The USCA For The Second Circuit]

A petition for panel rehearing having been filed herein by Appellants Marvin Rubenstein and Isaac Rubenstein,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

For the Court,
Roseann B. MacKechnie, Clerk

By:_____
Motion Staff Attorney